IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 671

HENRY M. STEELE, WILLIAM HAYWOOD LARKINS, PATRICIA GLORIA STEPHENS, PRISCILLA GWENDOLYN STEPHENS, ANGELINA NANCE, BARBARA JOAN BROXTON, JOHN ANGLISH BROXTON and CLEMENT COLLIER CARNEY,

Petitioners

v.

CITY OF TALLAHASSEE,

Respondent

and

ROBERT K. ARMSTRONG, ROLAND W. EVES, DEREK SPENCER LAWLER and JOHN J. POLAND,

Petitioners

v.

CITY OF TALLAHASSEE,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES MESSER, JR.
P. O. Box [illegible]
Tallahassee, Florida
Edward J. Hill
[illegible] East Jefferson Street
Tallahassee, Florida
Counsel for Respondent

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2-5
QUESTIONS PRESENTED	5
CONSTITUTIONAL PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	6-13
ARGUMENT	13-15
CONCLUSION	16
APPENDIX A—Article V, Constitution of the State of Florida (§§ 1, 3, 4, 5, and 6)	17-24
APPENDIX B—Opinions of Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida	25-46
APPENDIX C—Florida Statutes, §§ 590.092, 870.02 and 870.04	47-48
Tallahassee City Code, §§ 23-14 and 23-28	48

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

28 United States Code § 1257	2, 3, 4
Article V, Constitution of the state of Florida (§§ 1, 3, 4, 5 and 6)	2, 17-24
Florida Statutes, §§ 590.092, 870.02 and 870.04	6, 9, 10, 47-48
Tallahassee City Code, §§ 23-14 and 23-28	6, 48

TABLE OF CASES CITED
UNITED STATES SUPREME COURT

Page

Magnum Import Company v. Coty
262 U.S. 159 13

Matthews v. Huwe
269 U.S. 262 3

Speed et al v. City of Tallahassee
356 U.S. 913, 2 L.Ed. 2d 586, 78 S.Ct. 670 4

In the Matter of August Spires, et al
123 U.S. 80, 31 L.Ed. 131 15

Stratton v. Stratton
239 U.S. 55 3

United States v. Johnston
268 U.S. 220 13

DECISIONS FROM STATE COURTS

Hunt v. The City of Jacksonville
34 Fla. 504, 16 So. 398 3

Malone v. City of Quincy
66 Fla. 52, 62 So. 922 3

Mernaugh v. City of Orlando
41 Fla. 433, 27 So. 34 3

TEXTBOOK

"The Chicago Haymarket Riot" edited by Bernard R. Cogan (Boston: Heath, 1959) 14-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 671

HENRY M. STEELE, WILLIAM HAYWOOD LARKINS, PATRICIA GLORIA STEPHENS, PRISCILLA GWENDOLYN STEPHENS, ANGELINA NANCE, BARBARA JOAN BROXTON JOHN ANGLISH BROXTON and CLEMENT COLLIER CARNEY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent,

and

ROBERT K. ARMSTRONG, ROLAND W. EVES, DEREK SPENCER LAWLER and JOHN J. POLAND,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

While the opinions of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, and the orders denying the petitions for rehearing are not reported, copies of the same are, however, included in the appendix hereto (App. B).

JURISDICTION

The jurisdiction of this Court is invoked by the petitioners under 28 U.S.C. 1257 from which it is appropriate to quote the first clause:

> "Final judgments or decrees rendered by the *highest court of a state* in which a decision could be had, may be reviewed by the Supreme Court as follows:"

JURISDICTION OF THE CIRCUIT COURTS OF THE STATE OF FLORIDA

The Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, which affirmed the judgments in these two cases, along with the other circuit courts, is a primary trial court in Florida and has final appellate jurisdiction of all cases arising in municipal courts and no appellate proceedings lie in such cases from the Circuit Courts,[1] but the Supreme Court and the District Courts of Appeal have express power to issue writs of certiorari, a common law writ which issues in the sound judicial discretion of the Court to an inferior court, not to take the place of an appeal, but to

[1] Article 5, Sections 1, 3, 4, 5, and 6, Constitution of the State of Florida, are set out in Appendix A, infra. Article 5 is the judiciary article of the Florida Constitution.

cause the entire record of the inferior court to be brought up by certified copy for inspection in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law in cases where no direct appellate proceedings are provided by law. *Malone vs. The City of Quincy*, 66 Fla. 52, 62 So. 922.

The judgment of the Circuit Court under the Florida Constitution is not final and is reviewable by the District Court of Appeal and by the Court of last resort, the Supreme Court of Florida, where it can be shown that the Circuit Court has not proceeded according to the essential requirements of the law. The validity of city ordinances is frequently tested in Florida in this manner. *Hunt v. The City of Jacksonville*, 34 Fla. 504, 16 So. 398; *Mernaugh v. City of Orlando*, 41 Fla. 433, 27 So. 34; *Malone v. City of Quincy*, 66 Fla. 52, 62 So. 922.

If there is discretionary review by a higher State Court, the exercise of such discretion must be invoked. *Stratton vs. Stratton*, 239 U. S. 55; *Matthews v. Huwe*, 269 U. S. 262, 265-6.

The jurisdictional statute permitting this Court to review State Court cases by certiorari relates only to the final judgments rendered "by the highest court of a state in which a decision could be had." 28 U.S.C. Section 1257. A decision could have been had in these two cases in the District Court of Appeal and in the Florida Supreme Court by the writ of certiorari.

Apparently counsel for the petitioners in the petition for writ of certiorari recognize that they are on thin jur-

isdictional ice when on page 2 of the petition it is requested that the writ be addressed "to the Circuit Court for Leon County and not to the Supreme Court of Florida."

It is, therefore, respectfully submitted that until the petitioners have exhausted their remedies by seeking a review of the two judgments of affirmance entered by the Circuit Court of Leon County, Florida, by first the District Court of Appeal and second by the court of last resort of the State of Florida, viz., the Supreme Court of Florida, then under the provisions of 28 U.S.C. § 1257, this Court will not entertain the petition for certiorari.

This is the second attempt within three years to bypass the appellate courts of the State of Florida and to have this Court grant certiorari to the Circuit Court of the Second Judicial Circuit of Florida. See

No. 783. LEONARD D. SPEED, Joseph Spagna and Johnny Herndon, Petitioners, v. CITY OF TALLAHASSEE, FLORIDA
356 US 913, 2 L ed 2d 586, 78 S ct 670.
March 17, 1958. Petition for Writ of Certiorari to the Circuit Court of Florida, Second Judicial Circuit, denied.

We cannot help but comment that in the "ASSIGNMENTS OF ERROR (*Steele;* Caption Omitted)" appearing on page 27 of the appendix to the petition for writ of certiorari that the assignments of error are preceded by this significant statement:

"The defendants assign as the errors on which they intend to rely in *the Supreme Court of Florida for* reversal of the judgment of the Municipal Court

in and for the City of Tallahassee, Florida, appealed from, the following:"

QUESTIONS PRESENTED

Where persons assembled together within a private business establishment pursuant to prearranged concert and whose actions thereby create hostility and threats from a large number of other persons who congregated in said store and who refused to accede to the request of the management of the business establishment to leave and then subsequently refused to obey the statutory command of the mayor of the city to immediately and peaceably disperse, where the mayor had good reason to believe that the continued assembly of such persons may be the cause of a riot, did not the conduct of such persons refusing the command of the mayor constitute unlawful assembly under the provisions of state statutes prohibiting or providing that unlawful assembly shall constitute a misdemeanor when such state statutes have been adopted by municipal ordinance?

CONSTITUTIONAL PROVISIONS INVOLVED

The respondent does not believe that any Federal constitutional questions are involved and contends that the petition for certiorari would have this Court sift through evidence presented to the trial court and determine whether or not the acts of the petitioners in the two cases of *Steele* and *Armstrong* were sufficient to sustain the convictions by the Municipal Court of the respondent city.

STATEMENT OF THE CASE

As in the petition for writ of certiorari, the two cases will be referred to in the respondent's brief, for convenience as well as brevity, as *Steele* and *Armstrong*.

Petitioners in both cases were convicted by the Municipal Court in and for the City of Tallahassee, Florida, for alleged violations of certain sections of the Tallahassee City Code proscribing acts of disorderly conduct, breaches of the peace, and unlawful assembly, namely, Section 23-14 and Section 23-28 (the latter section incorporating by reference misdemeanors under State law, pursuant to which the Court below invoked Florida Statutes §§ 509.092, 870.02 and 870.04). These ordinances and statutes are set forth in full in the Appendix hereto. (App. C). Pursuant to the foregoing, the City charged petitioners in each case with the following counts:

> Count Two: "And that they did disturb the public peace by engaging in, promoting and encouraging disorderly proceedings in a private building, towit, 120-126 North Monroe Street, Tallahassee, Florida, said disorderly proceedings then and there tending to disturb those persons being in the vicinity of said private building, contrary to the laws and ordinances of said city in such cases made and provided, and against the peace and dignity of the said City of Tallahassee, Florida." (*Steele*, Tr. 139).
>
> Count Eight: That they "did then and there engage in unlawful assembly in that they did, and they being more than three persons, meet together, in the City of Tallahassee, Florida, to commit a breach of the peace, acting together and concertedly to prevent and disturb Samuel T. Davidson, Manager of F. W. Woolworth Co., located at 120-126 North Monroe Street in said City, in pursuing and following

his daily labor and the enjoyment of his right to refuse service to any persons who are objectionable or undesirable to said manager, by occupying certain seats or stools at the lunch counter, a public food establishment of the said F. W. Woolworth Co., and upon being refused lunch counter service and and said lunch counter being then and there closed by the manager to those assembled, continued to occupy said seats or stools in person and with wearing apparel, books, magazines, and other paraphernalia to the exclusion of all other persons, and in such nature as to inspire well grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while being so unlawfully assembled the Mayor of said City did go among those persons so unlawfully assembled and, upon making himself known to them and each of them, did, in the name of the State and City, command those so unlawfully assembled to immediately and peaceably disperse, and they did then and there refuse or neglect to obey such command, contrary to the laws and ordinances of the said City in such cases made and provided, and against the peace and dignity of said City of Tallahassee, Florida." (*Steele*, Tr. 135).

Other counts were also filed against petitioners, but were dismissed.

As set forth in the petition of *Steele*, the Municipal Court found petitioners guilty as charged in both Counts Two and Eight and sentences imposed as set forth in the petition. However, counsel for petitioners do not advise the Court that as to Count One the petitioners, towit, Larkins, Patricia Gloria Stephens, Priscilla Gwendolyn Stephens, Nance, Barbara Joan Broxton, John Anglish Broxton, and Carney, completely satisfied the judgments of conviction and sentence either by payment of the fine, by service of the sentence or by a combination of

payment of fine and service of sentence. As to Count Eight, the Municipal Court sentenced the petitioners but suspended the sentences. It is, therefore, submitted that as to Count One the case before this Court is moot except as to the petitioner, Henry M. Steele.

THE FACTS AS DISCLOSED BY THE RECORDS

Steele

In the case of *Steele* the facts are as follows: On February 20, 1960, petitioners entered the F.W. Woolworth Five and Ten Cent Store in the City of Tallahassee and seated themselves at the lunch counter of the store and requested lunch counter service. The manager of the store, through his agent, the operator of the lunch counter, informed petitioners that the lunch counter was closed, that service had been suspended and that "closed" signs were in evidence along the top of the lunch counter. The operator of the lunch counter then requested petitioners to leave the counter. It appears from the record that one week prior to the incident, a similar group of people entered the same store, engaged in the same procedures, and "seemed to cause some apprehension among other people in the store." (*Steele*, R. 14).

On the same day, the manager of Woolworth's, one Davidson, was directly approached by a person unknown to him and asked what was going to be done to get them [petitioners] out of the store. The record does not reflect whether or not this question to the manager was made prior to or after the manager's phone call [to the Tallahassee Police Department] for the purpose of informing the police that "there were some colored people sitting at our fountain." (*Steele*, R. 15).

The petitioners were refused service that they sought, as stated by the store manager, "because we felt it might cause a disturbance" (*Steele*, R. 28), and because "similar events had occurred in other sections of the United States . . . I assume what would be disorderly conduct." (*Steele*, R. 36).

The record further reveals that the same service as requested by petitioners had been refused "to a white person" (*Steele*, R. 28) "because they were objectionable to some of our customers." (*Steele*, R. 29).

The Woolworth Store, through its manager, was acting wholly within its legal rights by so refusing service as he stated "We are allowed under Florida law to refuse service to anyone." (*Steele*, R. 28). [Section 509.092, Florida Statutes, App. C]

It further appears from the record that the concerted action by petitioners was beginning to cause disturbance in Woolworth's Store. The Tallahassee Police Department began to receive calls pertaining to the presence of the petitioners in Woolworth's. The desk sergeant on duty was informed by telephone that "there was a group of Negroes in Woolworth Dime Store creating a disturbance" and was requested to "send police officers." (*Steele*, R. 99). The Captain of Police received a telephone call at the Police Station and was informed by the caller "if you people don't come and get them [petitioners] out, we will get them out." (*Steele*, R. 94). This information was related by the Captain of Police to the Mayor of Tallahassee, who was present in the Police Station. (*Steele*, R. 94).

The sequence of factual events as hereinabove described caused the Mayor of the municipality to take investigative steps. Upon arriving at Woolworth's, the Mayor conferred with the manager and was informed that service had been refused to petitioners at the lunch counter and that the food service of Woolworth's was now closed to all persons. The Mayor, having received several complaints during that week pertaining to incidents of that kind and experiencing apprehension as a result of the complaints (*Steele*, R. 50), and having received further calls and messages that were of a nature that he "deemed it a very serious and critical situation to the safety and welfare of the citizenry of the community"(*Steele*, R. 55), and finally, experiencing an apprehension and feeling that there would be breaches of the peace (*Steele*, R. 56), the Mayor, accompanied by the Senior Captain of Police, directed his attention to petitioners and addressed himself to one who indicated that she was spokesman for the group and pursuant to statutory authority [Section 870.04, Florida Statutes, App. C] and by separate but identical proclamations or commands commanded petitioners to "disperse immediately and peaceably (sic)," after first identifying himself as Mayor and making known his authority. (*Steele*, R. 52-53). Petitioners appeared to indicate a compliance with the Mayor's command, but upon mutual decision, or by signal, petitioners resumed their previous conduct and refused to disperse. They were thereupon arrested pursuant to the order of the Mayor.

There was no attempt upon the part of the Police Department of the respondent to make any arrest of the petitioners if they had obeyed the command of the Mayor to "disperse immediately and peaceably." According to

the record (*Steele*, R. 75), there appears the following uncontradicted testimony offered by the respondent city at the trial of the petitioners before the Municipal Court:

> "As Mr. Williams testified, he twice requested those persons to peacefully and quietly disperse. I might add that after the first request there were three persons grouped in the center of the counter. I believe the defendant on the end wearing glasses, and this woman right here. The defendant who is seated on the end and the defendant in the plaid dress and the woman in the plaid dress said, 'How do we know he is the Mayor,' And then—that was after they had gotten up—and apparently, I thought, were going to disperse, and then she said, 'This is not what we came here for. I thought we were going to stay until we were arrested.' And then after that they got into the huddle and then reseated themselves." (*Steele*, R. 75).

The Circuit Court, in affirming the judgments of conviction of the Municipal Court, found that the petitioners by their conduct made it clear that they would leave Woolworth's premises "only when forcibly ejected or placed under arrest." (App. B). That petitioners were persons in "substantial numbers seekling] to intrude themselves on private property and cencertedly takling] possession of part of the facilities owned by another" (App. B), and that the "disorderly invasion of the property rights of others is such as is likely to provoke resentment capable of developing into violence." The Circuit Court held that such an assembly was unlawful, and where the requisite number of persons assembled is involved, and they refuse to disperse peaceably when commanded by one so authorized to make such command, those so assembled are subject to punishment after proper trial and conviction. (App. B). The Court further held

that "wilful, obstinate and persistent seizure of another's private property with adamant refusal to yield such seizure when clearly requested to do so by the owner" is conduct which a trial court can find to be such that would give normally firm and brave persons in the vicinity reasonable grounds to apprehend a breach of the peace. (App. B).

That the petitioners completely appropriated the facilities of the lunch counter at Woolworth's to the exclusion of all others is borne out by the following from the record:

"Q. Well, what were these people doing?
"A. It was a rather chilly day. They had coats spread out on the seats that they were not occupying themselves. Some of them were reading apparently text books from the University and some of them were reading comic magazines, just sort of spread out all along the counter. They didn't sit in one group. There would be three together then maybe coats in two or three seats and then there would be three more.
"Q. Then the group generally occupied almost the entire counter?
"A. Yes." (*Steele*, R. 76).

In other words, the petitioners preempted the lunch counter irrespective of their seating requirements to the exclusion of all others.

Armstrong

The facts in *Armstrong*, as pointed out by the opinion of the Circuit Court (App. B) differ from those in Steele primarily in the parties and the date involved.

That there was justification for the belief on the part of the Mayor that there would be violence is amply supported by the record in *Armstrong*.

The Mayor stated that he and the Police Department "had threats of violence" (*Armstrong*, R. 63), and he felt that there would be violence "after I saw the circumstances" (*Armstrong*, R. 63), and finally he had reasonable grounds to think "there would be some [trouble] if I didn't do something about it, so I did." Even the testimony of one of the petitioners in *Armstrong*, towit, the petitioner Lawler, stated:

"There was an air of violence there." (*Armstrong*, R. 169).

ARGUMENT

1. Certiorari is not granted to review facts.

The decisions of the Court below are correct and there is no basis for further review. As this Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston* 268 U.S. 220, 227. Certiorari is not granted "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163.

2. The petitioners were arrested and convicted of the offense of unlawful assembly and disorderly conduct.

The petitioners would contend that the respondent city in causing the arrest of the petitioners and their conviction was attempting to uphold the policy of a private

business establishment in its service to its customers. Such is not the case and there is no racial question involved.

Had the petitioners complied with the command of the Mayor in each case to immediately and peaceably disperse, there would have been no arrests and consequently no convictions.

As pointed out in the statement of facts in both cases, *Steele* and *Armstrong*, the Mayor of the respondent had good reason to believe that the continued assembly of the petitioners would cause a riot. The opinion of the Mayor is even supported by the opinion of the petitioner Lawler when he testified:

> *"There was an air of violence there."* (*Armstrong*, *R.* 169).

The authorities cited by the Circuit Court in affirming the conviction in *Steele* (App. B., pages 10, 11 and 12) are ample to sustain the contention of the respondent that the petitioners were guilty of a breach of the peace, disorderly conduct and unlawful assembly. Apparently, counsel for the petitioners feel that the Mayor should have waited for the riot to start before giving the statutory command to the petitioners to immediately and peaceably disperse.

There was another mayor, who either from the standpoint of indecision or lack of courage failed to use the "Proclamation of the Riot Act," which has been adopted by many states from the old English Riot Act, towit, Mayor Harrison, of the City of Chicago, in the year 1886. As a result there occurred the Chicago Haymarket Riot

in which some seven or eight police officers of the City of Chicago were killed and approximately 66 or 67 police officers wounded. A comprehensive view of the Haymarket Riot is found in: *"The Chicago Haymarket Riot"* edited by Bernard R. Cogan (Boston: Heath, 1959). Those accused of instigating the riot were convicted of murder and their convictions upheld by this Court: *In the Matter of August Spires et al,* 123 U.S. 80, 31 L.Ed. 131. The death sentences of two of the defendants in the Haymarket Riot Case were commuted to life imprisonment. One of the defendants took his life before the day of his scheduled execution. The remaining defendants, numbering four, were hanged on the gallows.

According to the report of The Chicago Haymarket Riot, there were no statistics as to the deaths or injuries among those who participated in the riot, for the dead or injured participants were carried from the scene by their fellow companions or participants.

Did the Mayor of the respondent city give the statutory command to

"immediately and peaceably disperse"

too soon, or should he have waited until the riot started and citizens of the community had been killed or seriously wounded, including the petitioners?

CONCLUSION

It is respectfully submitted that the decisions of the Court below in the cases of *Steele* and *Armstrong* are correct; there is no conflict of decisions and no basis for further review. The petition for certiorari should be denied.

Respectfully submitted,

James Messer, Jr.
P. O. Box 878
Tallahassee, Florida

Edward J. Hill
216 East Jefferson Street
Tallahassee, Florida
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of respondent's brief in opposition to petition for writ of certiorari has, pursuant to Rule 33, Section 3, Subsection b of the Supreme Court of the United States, been served by mail upon Tobias Simon, Esquire, and Alfred I. Hopkins, Esquire, counsel for petitioners, at 706 Ainsley Building, Miami 32, Florida, by air mail this .....14th..... day of February, A.D. 1961.

James Messer, Jr.
of Counsel for Respondent

APPENDIX A

ARTICLE V. JUDICIAL DEPARTMENT

§ 1. Courts

Section 1. The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish. [Adopted general election, Nov. 6, 1956.]

§ 3. Practice and Procedure

Section 3. The practice and procedure in all courts shall be governed by rules adopted by the supreme court. [Adopted general election Nov. 6, 1956.]

§ 4. Supreme Court

Section 4. (1) *Organization.* The supreme court shall consist of seven members, one of whom shall be the chief justice. Five justices shall constitute a quorum, but the concurrence of four shall be necessary to a decision.

(2) *Jurisdiction.* Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certifi-

cates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto where a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.

(3) *Chief Justice.* The chief justice of the supreme court shall be chosen by the members of the court and shall serve for a term of two years. In the event of a vacancy, a successor shall be chosen within sixty days for a like term. During a vacancy or whenever the chief justice is unable to act for any reason, the justice longest in continuous service and able to act shall act as chief justice.

(4) *Clerk and Marshal; Process.* The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose. [Adopted general election Nov. 6, 1956.]

§ 5. District Courts of Appeal

Section 5. (1) *Appellate Districts.* The state shall be divided into three appellate districts of contiguous counties as the legislature may prescribe.

(2) *Organization; number and selection of judges.* A district court of appeal shall be organized in each appel-

late district. There shall be three judges of each district court of appeal. Not less than three judges shall consider each case and the concurrence of a majority shall be necessary to a decision. The court shall hold at least one session every year in each judicial circuit within the district wherein there is ready business to transact.

The judges of the district courts of appeal organized hereunder shall be selected as follows: Between June first and July first, 1957, the governor shall appoint three persons to serve as judges of each district court of appeal until their successors are elected, as herein provided. The judges so appointed shall take office and assume their duties on July first, 1957, and shall serve for a term to be designated by the governor in accordance with the following schedule: The governor shall appoint one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1959, following the election of his successor at the general election in November 1958, which judges shall be identified as Group "A"; one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1961, following the election of his successor at the general election in November 1960, which judges shall be identified as Group "B"; and one judge in each district for term expiring on the first Tuesday after the first Monday in January 1963, following the election of his successor at the general election in November 1962, which judges shall be identified as Group "C".

The successors of the original judges of the district courts of appeal shall be elected at the general election next preceding the expiration of their respective terms of office.

(3) *Jurisdiction.* Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.

The supreme court shall provide for expeditious and inexpensive procedure in appeals to the district courts of appeal, and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

The district courts of appeal shall have such powers of direct review of administrative action as may be provided by law.

A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before that district court of appeal or any judge thereof, or before any circuit judge in that district. A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction.

(4) *Clerks and Marshals.* Each district court of appeal shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court may direct. Their compensation shall be fixed by law. The marshal shall have power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff

for such purpose. [Adopted general election Nov. 6, 1956.]

§ 6. Circuit Courts

Section 6. (1) *Judicial Circuits.* The legislature may establish not more than sixteen judicial circuits each composed of a county or contiguous counties and of not less than fifty thousand inhabitants according to the last census authorized by law, except that the county of Monroe shall constitute one of the circuits.

(2) *Circuit Judges.* The legislature shall provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof according to the last census authorized by law. In circuits having more than one judge the legislature may designate the place of residence of any such additional judge or judges.

(3) *Jurisdiction.* The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts, in all cases involving the legality of any tax, assessment, or toll, in the action of ejectment, in all actions involving the titles or boundaries of real estate, and in all criminal cases not cognizable by subordinate courts. They shall have original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace. The circuit

courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.

The circuit courts and circuit judges shall have such extra-territorial jurisdiction in chancery cases as may be prescribed by law.

(4) *Court Commissioners.* A circuit judge may appoint in each county in his circuit one or more attorneys at law, to be court commissioners, who shall have power in the absence from the county of the circuit judge, to allow writs of injunction and to issue writs of habeas corpus, returnable before himself or the circuit judge. Their orders in such matters may be reviewed by the circuit judge, and confirmed, qualified or vacated. They may be removed by the circuit judge. The legislature may confer upon them further powers, not judicial, and shall fix their compensation.

(5) *Recommendation to Attorney General; Report to Legislature.* It shall be the duty of the judges of the circuit courts to report to the attorney general at least thirty days before each session of the legislature such defects in the laws as may have been brought to their attention, and to suggest such amendments or additional legislation as may be deemed necessary. The attorney general shall report to the legislature at each session such legislation as he may deem advisable.

(6) *State Attorneys.* In each judicial circuit a state attorney shall be elected by the qualified electors of that circuit in the same manner as other state and county

officials, to serve a term of four years and to fulfill duties prescribed by law.

(7) *Clerks of the Circuit Courts.* In each county a clerk of the circuit court, who shall also be clerk of the board of county commissioners, recorder, and ex officio auditor of the county, shall be elected by the qualified electors of that county in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law. [Adopted general election Nov. 6, 1956.]

APPENDIX B — OPINIONS BELOW

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA. AT LAW.
NO. 9627

HENRY M. STEELE, WILLIAM HAYWOOD LARKINS, PATRICIA GLORIA STEPHENS, PRISCILLA GWENDOLYN STEPHENS, ANGELLA NANCE, BARBARA JOAN BROXTON, JOHN ANGLISH BROXTON and CLEMENT COLLIER CARNEY,

Appellants,

vs.

CITY OF TALLAHASSEE,

Appellee.

APPEAL FROM JUDGMENT OF MUNICIPAL COURT OF TALLAHASSEE

The several appellants, eight in number, were among a group of eleven defendants who were charged, tried and convicted in the Municipal Court of the City of Tallahassee on each of two counts. Other counts preferred against them were quashed and dismissed by the trial court. The two counts numbered 2 and 8 on which the defendants were convicted charged that the appellants (and the other three defendants who have not appealed) did (Count Two):

"disturb the public peace by engaging in, promoting and encouraging disorderly proceedings in a private building, to wit, 120 North Monroe Street, Tallahassee, Florida, said disorderly proceedings then and there tending to disturb those persons being in the vicinity of said private building . . . "

and, in Count Eight,

"did then and there engage in unlawful assembly in that they did, and they being more than three persons, meet together in the City of Tallahassee, Florida, to commit a breach of the peace, acting together and concertedly to prevent and disturb Samuel T. Davidson, Manager of F. W. Woolworth Co., located at 120 North Monroe Street in said City in pursuing and following his daily labor and the enjoyment of his right to refuse service to any persons who are objectionable or undesirable to said manager by occupying certain seats or stools at the lunch counter, a public food establishment of the said F. W. Woolworth Co., and upon being refused lunch counter service and said lunch counter being then and there closed by the manager to those assembled, continued to occupy said seats or stools in person and with wearing apparel, books, magazines, and other paraphernalia, to the exclusion of all other persons of reasonable courage, of riot, or other breaches of public peace, and while being so unlawfully assembled, the Mayor of said City did go among those persons so unlawfully assembled and, upon making

himself known to them and each of them, did, in the name of the State and City, command those so unlawfully assembled to immediately and peaceably disperse, and they did then and there refuse or neglect to obey such command, . . . "

Judgments of conviction and sentences were duly rendered and appeals therefrom have lodged the cause in this court. Fla. Const. Art. V. Sec. 6(3).

The appellants contend that the evidence adduced at the trial is insufficient to support a conviction of the appellants on any offense charged. They also assert that their arrest and conviction constitute racial discrimination violative of the constitutional guarantees of equal protection of the laws, due process of law, and the privileges and immunities of citizenship.

The evidence adduced in the trial court is not in material conflict. The appellants (and their other codefendants in the court below) are Negroes. The F. W. Woolworth & Co. store in Tallahassee, Florida is located at 120 North Monroe Street in that City. This business is a traditional "dime" store but it also operates a lunch counter. The policy of this store was, on the date in question, to serve only white patrons at the lunch counter. On Saturday, February 20, 1960, the eleven persons, who were the defendants in the trial court, entered the Woolworth store at about 2:30 P. M. and together went to the lunch counter and each took a seat at one of the stools there. The waitress on duty at the counter informed the defendants that they would not be served and requested that they leave the counter. They did not leave whereupon the food service was discontinued and signs were displayed on the counter that it was closed. The de-

fendants remained seated at the counter, placed their wraps on other vacant seats, spread books and magazines on the counter, and read magazines or indulged in similar occupation. None of them engaged in any noisy or boisterous conduct or made any threats of violence, nor were they armed or did they use any abusive language.

There were a number of other persons in the store and the actions of the defendants attracted their attention. The manager of the store was apparently notified of the presence of the defendants by the waitress. The manager called the local police station and notified the officer on duty that there were a number of colored people seated at the lunch counter of the store. He did not specifically request police action.

After some hour or hour and a half during which the defendants remained seated at the counter, with counter service closed and with signs so placed as to indicate the counter was closed, the Mayor of the City of Tallahassee accompanied by a captain of police entered the store. He met the manager and was told by him that the food service counter had been closed, that the defendants had been refused service and that the presence of the defendants had caused him to have the counter closed. He also told the Mayor that he intended to keep the counter closed and would reopen it if the defendants would leave provided it was not then too near the regular closing hour to make it impractical to open it.

The Mayor then stood before the counter, counted the number of people seated there, and then approached the group. He asked a boy and girl among them if there was a spokesman for the group. The defendant Priscilla Stephens stated that she was spokesman. The Mayor

asked if she realized that the food counter was closed and that they had been refused service. No answer was definitely given. The Mayor pointed to the sign immediately to her right facing the counter and asked if she had seen that sign which stated that the counter was closed. She said that it must have "just been placed there". The Mayor replied that it had been there for some time.

He then moved toward the end of the counter and spoke to three or four of the other defendants, asking them if they realized that the food service was closed. They replied that all questions would have to be directed to their spokesman. The mayor pointed out the closed sign and again was referred to their spokesman. He then moved back to the spokesman, the defendant Priscilla Stephens, and identified himself as Mayor of the City of Tallahassee and that as such Mayor by authority vested in him by the citizens of Tallahassee and on behalf of the State of Florida he asked the defendants to disperse immediately and peacefully. She replied that they "didn't want to cause any trouble". Immediately following this, the spokesman and the other defendants made motions as if to comply with the Mayor's demand. The Mayor walked toward the rear of the store away from the defendants. The defendants then went into a huddle after which they all sat down again in the same seats and put their articles back where they had been. The Mayor, on observing this, returned to the spokesman and was told that defendants had decided to stay. The Mayor stated "I am to assume you are refusing my request?" There was no answer or movement. He repeated his demand (word for word as it has been previously given) that they disperse immediately and peacefully. After standing a short time awaiting a response and then observing no in-

dication of compliance with the demand, the Mayor directed the captain of police to arrest and take into custody all persons seated at the counter. The defendants were then arrested and taken into custody.

There is evidence in the record that this exhibition by the defendants aroused interest and curiosity among customers in the store and provoked anger and resentment in some unidentified persons against the defendants. The police station received one call demanding action to remove the defendants. The Mayor expressed some apprehension that there might be efforts on the part of some to react violently to the demonstration of the defendants.

Though the defendants at no time displayed or threatened physical violence, abusive language, noise or other boisterous action, they were obviously organized and determined to proceed to the food counter, take seats there and to remain until they were either served or forcibly removed.

Neither the trial court nor this court is authorized to judge the wisdom or ethics of the policy of the Woolworth store in declining to serve food at its food counter to persons who are in the racial classification of the defendants. Its legality only may be considered. That such a policy is lawful is clearly set forth in F.S. 501.092, which provides in part:

> " . . . public food service establishments are declared to be private enterprises and the owner or manager of [such]—establishments shall have the right *to refuse accommodations or service to any person who is objectionable or undesirable*

to said owner or manager". (Emphasis supplied)

The refusal to serve the defendants for any reason or without a reason is a prerogative of the owner or manager of a public food service establishment.

The defendants could possibly have been justified in assuming that they were invitees to all portions of the store and to all its customer facilities when they approached and entered the store. This would be so if they did not in fact know of the policy of not serving Negroes at the food counter. However, when the waitress informed them that they would not be served and asked them to leave they were clearly advised of the policy. This was emphasized when the counter was closed. When the defendants refused to leave the seats when requested by the employee and agent of the owner and of the management they each became a trespasser. This is so regardless of the fact that the policy may be regarded by the defendants and their sympathizers as unfairly discriminatory to their race. By persisting in occupying the seats and placing their personal effects in vacant seats and on the counter they denied to the owner his right of possession and use of privately owned property.

Their concerted action and refusal to leave when properly requested implied to all, including the owner, a design and purpose to require a change of policy by the management as the price of termination of the trespass, and that failing in achievement of such change they would stubbornly persist in a continuing trespass until physically evicted.

The management of the store was thus confronted with the circumstance of either capitulating to the de-

mands made by the defendants, suffer the continued loss of possession of part of the facilities of the store, or bodily remove the defendants. Being unwilling to capitulate (as was the right of the management) the obstinate and continued trespass was provoking increasing attention and potential emotional reaction from other members of the public. Physical bodily removal of thirteen fully matured youths of both sexes would necessarily create a spectacle in the store which could and probably would result in damage to the store and possible personal injury to the removers and the removed.

The appellants contend in effect that the management of the store had no choice but to serve them food or suffer their persistent unwelcome presence. They say that the city and state may not correct this wrong by arrest of the wrongdoers, or after a fair trial, punish them for their conduct.

Section 23-14 of the Tallahassee Code provides, in parts pertinent to this case, that:

> "No person shall disturb a public place by engaging in or promoting or encouraging, aiding or abetting any . . . noisy and disorderly proceedings in any . . . place of general resort . . . or in any private building when such noisy or disorderly proceedings therein committed shall tend to disturb any person residing or being in the vicinity of such private house or building."

The ordinance denounces public disturbances occasioned from fights, riots, or noisy and disorderly proceedings in public places such as streets, squares or other places of general resort. It also condemns disturbances

such as a fight, riot, "or other noisy *or disorderly proceedings*" in a private building when such conduct "shall tend to disturb any person—being in the vicinity of such—building." With regard to private property disorders the ordinance undertakes to define them as conduct which "shall tend to disturb" persons in or close to the private building. The language used with regard to the private property misconduct must be interpreted to mean such acts as would be regarded by ordinary sane, courageous and reasonably tolerant persons of the community as disorderly and, in addition, would be regarded by such persons as disturbing and offensive to them when performed in their presence.

Count Two of the charge against the defendants charges that defendants "did disturb the public peace" by engaging in, promoting and encouraging "disorderly proceedings" at a described private building "tending to disturb those persons being in the vicinity of said private building".

Does the evidence sustain a finding by the trial court that the appellants:

(1) Did disturb the public peace;
(2) Engaged in, promoted and encouraged disorderly proceedings; and that such did
(3) Have a tendency to disturb those persons who were then in the vicinity of said private building?

The charge in this count is obviously framed to allege a violation of Section 23-14 of the city code. The charge and the ordinance seek to deal with conduct similar to that embraced within the common law offenses of

"breach of the peace" and "disorderly conduct". These two common law offenses seem to be similar to each other, though the latter is probably of broader scope and would embrace any unlawful act denounced by ordinance or statute. The former, breach of peace, is somewhat more restricted and reaches only conduct which disturbs or tends to disturb the tranquility of the community. This would obviously include fighting, damaging of property, threatening injury by display of firearms, loud and boisterous language, menacing gestures in an angry manner, excessive noise, and other conduct which would put others in terror for their safety or would be destructive to their reasonable comfort. However, such clear rashness is not the extent of the scope of the offense. An act of violence or an act likely to produce violence is within its orbit, but also embraced are acts which, by causing consternation and alarm, disturb the peace and quiet of the community. Cases cited 5 Words and Phrases p. 767 under topic "Violence". Blackstone is cited as saying that, besides the actual breach of the peace, anything that tends to provoke or excite others to break it is an offense of the same denomination. The court in State v. White (Rhode Island) 28 A. 968, thus held that where parties attempted to go through a gate which blocked a public way and was a nuisance they were guilty of a breach of peace in provoking a fight while so doing. See also Plattsburg v. Smarr (Mo.) 216 S.W. 538; Halter v. State (Nebr.) 105 N.W. 298, 7 L R A (N.S.) 1079, Am. St. Rep. 754; 5 Words & Phrases pp 763 et seq. Included are also acts which tend to excite violent resentment. Delk v. Commonwealth (Ky.) 178 S.W. 1129.

The term "peace" used in this connection is said to mean the tranquility enjoyed by the citizens of a munici-

pality or community where good order reigns among its members. This is the natural right of all persons in political societies and any violation of that right is a breach of the peace. Davis v. Burgess (Mich.) 20 N.W. 540, 52 Am. St. Rep. 828.

"Disorderly conduct" has been similarly defined. It has been held to be conduct of such a nature as will affect peace and quiet of persons who may witness it and who may be disturbed or driven to resentment by it. State v. Miller, (Minn.) 91 N.W. 2d 138, 141; State v. Reynolds (Minn.) 66 N.W. 2d 886, 889. It has been said that disorderly conduct must involve an actual or threatened breach of peace which means a disturbance of the tranquility of the people, and that it must be such conduct as reasonably tends to a breach of the peace or at least such that a breach of the peace has become imminent or might reasonably be expected or intended to flow from the conduct. People ex rel Hersh v. Rothberg, 167 N.Y.S. 2d 813, 814, 8 Misc. 2d 259.

Testing the conduct of the appellants against these expressions of the elements of the commmon law offenses above discussed and the words charged in Count Two, it seems clear that such conduct came within the condemnation of the ordinance and within the offense charged in the count. Though there was no violence actually displayed or patently threatened or noisy tumult made or exhibited, yet the willful, obstinate and persistent refusal to vacate after a representative of the owner and management had requested it was an ominous threat to the tranquility of the vicinity. Stubborn determination to hold onto the private property of another until some distasteful policy of the latter is altered to the transgressor's liking, would be greatly disturbing to the man-

agement, other employees of the buisiness and all others who may be present.

In State v. Cooper, (Minn.) 285 N.W. 903, 122 A.L.R. 727 it was held that defendant's conduct in carrying a large banner, some 3 feet in length, on each side of which was printed the words: "Unfair to Private Chauffeurs and Helpers Union, Local 912" immediately in front of a private home in an exclusively residential district was held suffcient to sustain a conviction of violation of an ordinance forbidding the making, aiding countenancing or assisting in making any disturbance or improper diversion. The defendant had claimed the benefit of certain labor laws which permitted peaceful picketing in industrial disputes. The Court held the statutes did not affect a controversy involving domestic service. In sustaining the conviction the Court said:

"Defendant's conduct was likely to arouse anger, disturbance or violence. That there was no outburst of violence was not due to his behavior but to the fortunate circumstance that he was arrested and taken away before any trouble broke. The defendant's presence at the McMillan home carrying this banner was likely to provoke trouble and breach of peace. . . ."

The appellants' conduct was such that the trial court might find that it was likely that trouble would have been provoked.

The evidence sustains the findings and judgment of the trial court on Count Two.

It is to Count Eight that appellants make their greatest challenge. This charge is similar to the common

law offense of "unlawful assembly". However, there are ordinances which deal specifically with the subject. By Section 23-28, Tallahassee Code, it is provided that it shall be unlawful for any person to commit within the city limits any act which is or shall be recognized by the laws of the State as a misdemeanor and the commission of such acts is forbidden. F.S. 870.02 denounces the meeting together of three or more persons "to commit a breach of peace, or to any other unlawful act." F.S. 870.04 provides, in pertinent parts, as follows:

> "If any number of persons, whether armed or not, are unlawfully . . . assembled in any city . . . the mayor . . . of said city, shall go among the persons so assembled . . . and shall in the name of the state command all the persons so assembled immediately and peaceably to disperse . . ."

It further provides that if such persons do not disperse the officer

> "shall command the assistance of all persons in seizing, arresting and securing such persons in custody . . .".

Also included is the provision that any person who refuses or neglects to obey the officer's requirement "to depart from the place . . . shall be deemed one of the . . . persons unlawfully assembled, and may be prosecuted and punished accordingly."

At common law the crime of unlawful assembly is defined as an assembly of three or more persons to commit a crime or to carry out a common purpose, lawful or

unlawful, in such manner as to give firm and courageous persons in the neighborhood of such assembly reasonable grounds to apprehend a breach of peace in consequence of it. See 91 C.J.S. (unlawful assembly) p. 495.

The offense charged in Count 8 differs from that in Count 2 in that the former adds the elements of the assembly of more than three persons (to commit a breach of peace) and the failure to peaceably disperse when ordered to do so by the mayor of the city.

As has already been noted in the discussion of Count 2, the appellants were actually engaged in a breach of the peace when they refused to vacate the seats they occupied when requested to do so by the waitress and the closed signs had been displayed. That, there were more than three persons acting in concert and assembled together is not questioned, nor is the evidence lacking or in dispute that all of the appellants were so assembled.

The appellants contend that since there was no loud or boisterous talk, threatening gestures or acts of violence then there was no disorder or breach of the peace and therefore their assembly was not unlawful. Much is said about the mildness of the concern of the manager of the store in that when he notified the police of the defendants' presence in the store that he made no request for action, did not swear out a warrant, and when the police did arrive made no request to arrest the defendants. The purpose of emphasizing such matters is to demonstrate the absence of any threat or apprehension of violence or tumult. However, it is not necessary for there to be rout or riot or noise or physical violence for an assembly to be unlawful. It is enough if it is for the purpose of reaching an objective in such a manner as to give sane, firm and

courageous persons in the neighborhood of such assembly reasonable grounds to apprehend a breach of peace in consequence of it.

Willful, obstinate and persistent seizure of another's private property with an adamant refusal to yield such seizure when clearly requested to do so by the known owner or his representative is conduct which may be found by a trial judge to be such as to give normally firm and brave persons in the vicinity reasonable grounds to believe that a breach of peace would flow from such conduct. This would be especially true when, as here, the trespassers are fully developed college age youths who are clearly crusading for an objective which their trespass is designed to facilitate in achieving.

In upholding the sufficiency of the evidence to sustain the offenses charged, this Court is not holding or even suggesting that any class, color, creed, race, or other group of persons may be condemned as disorderly or unlawfully assembled when they peacefully seek objectives without infringing on the rights of others. However, when persons in substantial numbers seek to intrude themselves on private property and concertedly take possession of part of the facilities owned by another and refuse adamantly to desist when proper demands by the owner or his agents are made such conduct is presumptious, disorderly and invasive of property rights of others, and provocative of resentment which would likely advance to violence. An assembly for such purposes is unlawful and subjects those so assembled to punishment by proper authorities after trial and conviction.

None of the cases cited by appellants which involved reversals of convictions for either disorderly conduct or

unlawful assembly appear to involve alleged misconduct on private property, with the exception of People v. Swold, 73 N.Y.S. 2d 399 (City Court of Utica).

In the case last cited, the City Judge of Utica, N.Y. granted a motion to dismiss the information and discharge the defendant after trial. The defendant was a taxi driver operating independently. At about 8:30 P.M. on April 11, 1947 he was told by the complainant (who appears to have been one of the station police) to stop soliciting passengers in the Union Station. Defendant left but returned at 1:00 A.M. the following morning. He was again told to leave, he refused and was arrested for disorderly conduct. The trial court held that the facts did not show disorderly conduct. It was said that a refusal to leave private property does not in and of itself constitute disorderly conduct, and that as there was no breach of the peace or threat of such the proof failed to establish the offense charged.

Though the opinion in this case is that of a court which is not appellate and but scantily persuasive here, pause will be made to note that there is a vast difference in the case here and the one there. In the case cited it is not shown that the defendant was actually soliciting customers, but was merely present. All taxi drivers had been ordered to leave and defendant did not immediately obey. He was arrested then. There was no showing there of persistent defiance of either the officer or the property owner. In the case at bar the defendants, by their conduct, made it clear that they would leave only when forcibly ejected or placed under arrest.

It thus appears that the offense set forth in Count Eight adequately charged a violation of the city ordinance and the evidence sustains the finding of guilt.

Counsel for appellant raises a point that the convictions constitute a deprivation of appellants' liberty without due process of law because the record is barren of evidence of commission of an offense. They cite the case of Thompson v. Louisville, ...U. S....; 28 Law Week 4198; No. 59 October Term 1959 (1960). To convict one who is charged with crime or other offense and who denies guilt, without evidence to sustain it, would violate every precept of due process, equal protection and preservation of privileges and immunities vouchsafed to every citizen by state and federal constitutions and also by the positive statutory and common law of this state If such were the case here there would be no need to invoke the United States Constitution. No city ordinance, state statute, court rule, or case precedent purports to directly or indirectly sanction such a conviction. If the record were barren of evidence to sustain the convictions this court would set them aside as being contrary to the law of this state. The contention thus made is without merit.

The final point raised is whether or not the arrest and conviction of appellants constitutes racial discrimination in violation of constitutional guarantees under the Fourteenth Amendment to the U. S. Constitution. The basis for the contention that there is violation of constitutional rights appears to stem from the fact that the defendants are all Negroes, that they were seeking to obtain food service from the store which offered and provided that service only to white persons, and that the arrests and convictions were an interference with the pursuit of their objective of obtaining a change in the policy of the store which excluded them from that particular service. They contend that the participation

of the arresting officers and the trial court constituted state action which unconstitutionally discriminated against the Negro appellants, Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 is cited in support of this contention. In that case it was held that judicial enforcement of a restrictive covenant against non-white persons was a denial of equal protection of the law.

However, the Court in that case was careful to point out that the 14th Amendment "'erects no shield against merely private conduct, however discriminatory or wrongful". It was also held that: " . . . restrictive covenants standing alone cannot be regarded as violative of any rights guaranteed—by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there had been no action by the state . . .".

The mayor and police officers never undertook to make, break or enforce the policy of Woolworth's store to deny service to Negroes at its food counter. They were confronted with a concerted action to seize private property and hold it until ransomed by a change in the policy. Woolworth could serve or not serve any person it chose. The fact that it chose not to serve appellants, however discriminatory it may be, was not unlawful. Police action was to terminate a wrongful trespass amounting to a breach of peace.

Valle v. Stengel, 176 F. 2d 697 (3rd Cir. 1949) cited by appellants is not in point. In that case the state law applicable prohibited a proprietor of a place of public resort from refusing accommodations or service on account of race. The Negro plaintiffs were fully within their

rights in seeking admission and it was unlawful for the proprietor to refuse them. Such is just the opposite in the case at bar.

Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1094, 30 L. Ed 220 is not in point. There was actual discrimination in the application of a regulation in that case. There is no showing of such in the case at bar. The appellants were arrested only after they had adamantly refused to disperse after being twice commanded to do so by the mayor. Under like circumstances when a number of persons of any race would seize property not belonging to them and persist in holding it until the owner accorded them some privilege in his power to grant or withhold, it would be expected that law enforcement authorities would have acted in a manner similar to that followed here. The record fails to show that such a procedure had not been or would not be invoked had the trespassers been of the white or any other race.

Other authorities cited by appellants have been examined and found not to be in point. Other contentions made by appellants have been considered and found to be without merit.

The judgments appealed from are hereby AFFIRMED.

APPEAL FROM JUDGMENT OF MUNICIPAL COURT OF TALLAHASSEE

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.
NO. 9675

ROBERT K. ARMSTRONG, ROLAND W. EVES, DEREK SPENCER LAWLER, STEPHEN R. POE and JOHN J. POLAND,
Appellants,

vs.

CITY OF TALLAHASSEE,
Appellee.

Counsel for the respective parties have waived oral argument and counsel for appellants has waived the filing of a reply brief to the brief of the appellee. Accordingly, this cause is considered on transcript of record, the assignments of error and on the briefs of the parties filed herein.

This case is very similar to the case pending in this court styled Henry M. Steele, et al v. City of Tallahassee (Law No. 9627) and in which this Court has today entered its judgment and opinion of affirmance of the Municipal Court of Tallahassee. The identical legal points are involved. The factual situation in this case differs from that in the Steele case primarily in the parties involved and the date of the events involved.

In the case at bar the appellants are all white persons. They, together with other persons including several Negroes, participated in a so-called "sit-in" demonstration at the lunch counter of Woolworth's store in Tallahassee on March 12, 1960. This was exactly two weeks after the events at the same place which were involved in the Steele case.

Here the appellants were not refused service at the food counter because of their race. However, evidence appears which would sustain a finding by the trial court that each of the defendants did actively participate in a scheme or plan to encourage, aid and abet the commission of willful, obstinate and persistent trespass on private property so as to create disturbances amounting to a breach of peace.

The evidence in many respects is conflicting, but it is the trial court which resolves such conflicts. The record reflects the presence of substantial competent evidence to sustain the findings and judgments of the trial court with reference to each of the appellants.

The nature of the charges made against the appellants here were the same as those made in the Steele case. The acts of the appellants here differed from those of the defendants in Steele only in the manner in which the white participants joined in sympathetic demonstration. If anything, the danger of violence and serious disorder was greater in the case at bar than in Steele.

It would not be useful to repeat what was said in the Steele case and the principles set forth there are found to be pertinent and controlling here. Accordingly, it is held

that there is ample evidence to sustain the convictions on the charges made, and that the appellants have been denied no constitutional rights under the 14th Amendment to the U.S. Constitution or other rights.

The judgments of the trial court be and the same are hereby

AFFIRMED.

APPENDIX C—STATUTES AND ORDINANCES

FLORIDA STATUTES § 590.092

PUBLIC LODGING AND FOOD SERVICE ESTABLISHMENTS; RIGHTS AS PRIVATE ENTERPRISES:

Public lodging and public food service establishments are declared to be private enterprises and the owner or manager of public lodging and public food service establishments shall have the right to refuse accommodations or service to any person who is objectionable or undesirable to said owner or manager.

FLORIDA STATUTES § 870.02:

UNLAWFUL ASSEMBLIES:

If three or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months, or by fine not exceeding five hundred dollars.

FLORIDA STATUTES § 870.04:

MAGISTRATE TO DISPERSE RIOTOUS ASSEMBLY:

If any number of persons, whether armed or not, are unlawfully, riotously or tumultously assembled in any city or town, the sheriff or his deputies, or any constable or justice of the peace of the county, or the mayor or any alderman of the said city or town, shall go among the persons so assembled or as near to them as may be with safety, and shall in the name of the state command all the

persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse said officers shall command the assistance of all persons in seizing arresting and securing such persons in custody; and if any person present being so commanded to aid and assist in seizing and securing such rioter or persons so unlawfully assembled or in suppressing such riot or unlawful assembly, refuses or neglects to obey such command, or, when required by such officers to depart from the place, refuses and neglects to do so, he shall be deemed one of the rioters or persons unlawfully assembled, and may be prosecuted and punished accordingly.

TALLAHASSEE CITY CODE, § 23-14:

No person shall disturb a public place by engaging in or promoting or encouraging, aiding or abetting any . . . noisy and disorderly proceedings in any . . . place of general resort . . . or in any private building when such noisy or disorderly proceedings therein committed shall tend to disturb any person residing or being in the vicinity of such private house or building.

TALLAHASSEE CITY CODE, § 23-28:

It shall be unlawful for any person to commit within the corporate limits of the city any act which is or shall be recognized by the laws of the State as a misdemeanor and the commission of such acts is hereby forbidden.